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In the Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its state implementation plan including such a new source review program contains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.

PARTIES TO THE PROCEEDING

In addition to the Natural Resources Defense Council, respondents include Citizens for a Better Environment, Inc. and the Northwestern Ohio Lung Association, Inc. Nominal respondents include Chevron USA, Inc. (petitioner in No. 82-1005) and the American Iron and Steel Institute, the American Petroleum Institute, the Chemical Manufacturers Association, General Motors Corporation, and the Rubber Manufacturers Association (petitioners in No. 82-1247). Other respondents under Rule 19.6 include various member companies of two of the organizations that are petitioners in No. 82-1247, and a group of 81 electric power generating companies and two electric utility trade associations, all of which were intervenor-respondents in the court of appeals. Those additional respondents are listed at 82-1247 Pet. iii nn.1, 2 and 3.

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NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (82-1005 Pet. App. A-1 to A-20) is reported at 685 F.2d 718.[1]

[1] The petitions in No. 82-1005, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, et al.*, and No. 82-1247, *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, et al.*, also seek review of the judgment of the

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1982. Timely petitions for rehearing were denied (82-1005 Pet. App. B-22 to B-25) on October 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. (Supp. IV) 7401 *et seq.*, are reproduced at 82-1247 Pet. App. 1a-10a. Pertinent portions of implementing regulations, 40 C.F.R. 51.18(j), are reproduced at 82-1247 Pet. App. 32a-33a.

STATEMENT

This case presents a question as to the meaning of the term "stationary source" as it is employed (without any explicit statutory definition) in key provisions of the 1977 Amendments to the Clean Air Act. Those provisions require states that had not, by 1977, met national air quality standards established under statutory authority by the Environmental Protection Agency to establish permit programs regulating the construction of "new or modified major stationary sources" of air pollution. To fill the definitional void left by the statute, in October 1981, after allowing for notice to the public and consideration of comments received, the Environmental Protection Agency adopted by regulation a definition that had earlier been proposed in 1979. The 1981 regulation permits

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court of appeals in this case. We will not respond separately to these petitions. Because the materials required to be reproduced by Rule 21(k) are included within the previously filed petitions we refer to those petitions where appropriate, rather than duplicating the materials found there.

the states to adopt a "plantwide" definition of "stationary source" that treats an entire industrial plant as single source. It thus exempts from the formal new source review process addition of equipment and modifications to existing equipment within a plant if increased emissions from the new or modified unit are offset by corresponding decreases from another unit within the plant so that aggregate plant emissions do not increase more than de minimis amounts. Under the 1981 regulations the states also retained the option to treat each component of a plant as a separate source. Thirty-one states have to date availed themselves of the plantwide source definition and have sought to modify the state implementation plans required under the Act to incorporate that approach. In this case, however, the United States Court of Appeals for the District of Columbia Circuit invalidated the EPA's 1981 regulations, concluding that the general purposes of the 1977 Amendments to the Act left the Agency with no discretion to sanction a plantwide definition in this context.

1. As amended in 1970, the Clean Air Act established a federal-state partnership which recognizes that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 1857(a)(3) and 42 U.S.C. (Supp. IV) 7401(a)(3).[2] The Environmental Protection Agency ("EPA") was

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[2] At the time of the 1970 Amendments, Pub. L. No. 91-604, 84 Stat. 1676, the Act was codified at 42 U.S.C. 1857 *et seq.* In 1977 the Act was further amended. As amended, the Act was reclassified to 42 U.S.C. (Supp. IV) 7401 *et seq.* Where reference is made to pre-1977 provisions that were not materially changed by the amendments of that year citations to both the former and present codifications are provided.

required to establish a set of primary and secondary National Ambient Air Quality Standards ("NAAQS"). Section 109, 42 U.S.C. 1857c-4 and 42 U.S.C. (Supp. IV) 7409.[3] The primary NAAQS, were to be designed to protect the public health, while the secondary NAAQS were designed to protect public welfare.

Following promulgation of the NAAQS by EPA, each state was required to adopt a plan, known as a "state implementation plan" or "SIP," to attain and maintain the EPA-promulgated NAAQS by the deadlines established in the Act. Sections 107(a) and 110(a)(2), 42 U.S.C. 1857c-2(a) and 1857c-5(a)(2) and 42 U.S.C. (Supp. IV) 7407(a) and 7410(a)(2). For primary standards this date was generally 1975. If the SIP provided for timely attainment and maintenance of the NAAQS and otherwise complied with the requirements of the Act, the Administrator was required to approve it. Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2) and 42 U.S.C. (Supp. IV) 7410(a)(2).

2. Many areas of the country failed to attain the primary NAAQS by the deadlines established in the 1970 amendments. Congress accordingly amended the Act in 1977 to address this problem. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. In Part D of Title I of the amended act[4] Congress adopted special provisions to be applied in the so-called nonattainment areas. Congress directed the states to submit substantially revised SIPs for the Administrator's approval. In order to be approved

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[3] Pursuant to this authority, the Administrator has promulgated primary and secondary NAAQS for sulfur dioxide (SO_2), particulate matter, carbon monoxide (CO), nitrogen dioxide (NO_2), photochemical oxidants and lead. 40 C.F.R. Part 50.

[4] 42 U.S.C. (Supp. IV) 7501-7508.

by the Administrator, a revised SIP was required to provide for attainment of the primary NAAQS by December 31, 1982.[5] In addition, revised SIPs were required to comply with the provisions of Section 172(b) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7502(b), including, *inter alia*, implementation of all reasonably available control measures as expeditiously as practicable, annual incremental reductions in emissions from existing sources leading to "reasonable further progress" toward attainment, and a permit program governing construction of "new or modified major stationary sources" of air pollution.[6]

The permit program for new or modified sources is commonly referred to as the new source review program. Section 173, 42 U.S.C. (Supp. IV) 7503, established four mandatory elements for such a program. First, permits to construct may be issued only if the owner or operator of a proposed new or modified major source obtains sufficient emission reductions in the region to offset the increased emissions from that source, and allow for reasonable further

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[5] 42 U.S.C. (Supp. IV) 7502(a)(1). If a state demonstrated that it could not meet the 1982 deadline for attainment of the primary NAAQS for carbon monoxide and ozone, the Administrator was authorized to grant further extensions to December 31, 1987. 42 U.S.C. (Supp. IV) 7502(a)(2).

[6] Section 172(b)(2) and (3), 42 U.S.C. (Supp. IV) 7502(b)(2) and (3). A stationary source is defined as a "major" one if it "directly emits or has the potential to emit, one hundred tons per year or more of any air pollutant * * *." Section 302(j), 42 U.S.C. (Supp. IV) 7602(j). An existing major source is "modified" whenever its emissions increase by more than a de minimis amount, as determined by EPA. See Sections 111(a)(4) and 171(4), 42 U.S.C. (Supp. IV) 7411(a)(4) and 7501(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979).

progress toward attainment, or, alternatively, if the increased emissions will not exceed an allowance for growth budgeted by the state pursuant to Section 172(b)(5), 42 U.S.C. (Supp. IV) 7502(b)(5). See Section 173(1), 42 U.S.C. (Supp. IV) 7503(1). Second, the source must be equipped with state-of-the-art emissions controls meeting a standard described as the "lowest achievable emission rate." Section 173(2), 42 U.S.C. (Supp. IV) 7503(2). Third, the permit applicant must certify that all the other sources owned, operated, or controlled by him in the state are in compliance with the applicable SIP. Section 173(3), 42 U.S.C. (Supp. IV) 7503(3). Finally, no permit may be issued unless the state is carrying out the applicable implementation plan for the nonattainment area in which the proposed source is to be located. Section 173(4), 42 U.S.C. (Supp. IV) 7503(4).

To prevent further degradation of air quality in nonattainment areas while the states formulate their revised SIPs, Congress required each state to impose a limited conditional moratorium on the construction or modification of major stationary sources in such areas until EPA approves a revised Part D SIP. Section 110(a)(2)(I), 42 U.S.C. (Supp. IV) 7410(a)(2)(I).

3. Although the new source permit review program and the construction moratorium each apply to "major stationary sources," the term "source" is not defined in the Act for the purposes of the nonattainment program. Since enactment of Part D, two competing constructions of the term source have been suggested. Under the first, a plantwide definition, an entire plant is treated as a "source."[7] Under such a

[7] Such a definition is frequently described as employing a "bubble" concept.

definition, when emissions from one process unit within the plant are increased, or a new process unit is added, the change need not undergo formal new source review if the operator can reduce emissions of the same pollutant elsewhere within the plant so that total emissions do not increase by more than a de minimis amount.[8] Under an alternative construction of the statute, each process unit within a plant is viewed as a "source;" any major new process unit or any significant increase in emissions from an existing unit triggers formal new source review, even if aggregate emissions from the plant of which the unit is a part decrease or remain the same.

b. In 1979, EPA proposed regulations to govern the new source review programs contained in revised SIPs required by Part D of the amended Clean Air Act. 44 Fed. Reg. 51924, 51933. These rules would have permitted states with approved revised SIPs to adopt a "plantwide" definition of source. States without approved revised SIPs, however, would have been required to use a unit-by-unit definition of source under which emissions from each part of a plant were reviewed individually. *Ibid.*

In the final new source review regulations promulgated on August 7, 1980, the Agency reversed itself. It adopted what is commonly referred to as the "dual definition" of "stationary sources." Under that definition, both an entire plant and discrete pieces of pollutant-emitting equipment within a plant were treated as "sources."[9] The states were therefore re-

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[8] That is, if total emissions do not increase sufficiently that the change is deemed a "modification" of the plantwide source for purposes of the new source review. See *supra* p. 5 note 6.

[9] See 40 C.F.R. 51.18(j)(1)(ii), (iii) (1981); and 40 C.F.R. 52.24(f)(2), (3) (1981).

quired to subject new and modified emission producing equipment units located in nonattainment areas to new source review under all circumstances where emissions from the specific equipment increased by more than threshold amounts (see *supra* p. 5 note 6) irrespective of any actual effect upon aggregate plant emissions or air quality. They were also required to subject an entire plant to new source review if emissions from the plant as a whole increased by more than a threshold amount, even if no increase exceeding the threshold occurred at any particular unit. See 45 Fed. Reg. 52676, 52696-52698 (1980).[10]

Seven months later EPA proposed to restore the "plantwide" definition of source for nonattainment new source review. 46 Fed. Reg. 16280 (1981) (82-1247 Pet. App. 10a-18a). That definition was formally promulgated on October 14, 1981. 40 C.F.R. 51.18(j)(1)(ii); 40 C.F.R. 52.24(f)(2); see 46 Fed. Reg. 50.66 (1981) (82-1247 Pet. App. 19a-33a).[11] EPA identified two concerns as warranting this

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[10] In addition, the August 7, 1980 regulations treated substantially reconstructed process units as new sources. 40 C.F.R. 51.18(j)(1)(ix) (1981); 40 C.F.R. 52.24(f)(9) (1981). The effect of this approach was to require formal new source review of such reconstructed facilities even when emissions were not greater than those of the equipment superseded. See *supra* p. 5 note 6 & p. 7 note 8.

[11] In the October 14, 1981, regulations EPA also eliminated the special reconstructed source rule that had been adopted in 1980 (see *supra* note 10), explaining that in light of the plantwide definition of source adopted, a reconstruction requirement no longer was necessary. The agency anticipated that an entire plant rarely would be reconstructed (82-1247 Pet. App. 25a-26a).

change. First, the revised definition conformed to the definition previously established for stationary sources under the separate Prevention of Significant Deterioration (PSD) program established by the 1977 Amendments to the Act, Section 160-169, 42 U.S.C. (Supp. IV) 7470-7479 (82-1247 Pet. App. 32a).[12] Second, EPA concluded that states should have discretion as to how to define "stationary sources," provided that their SIPs still meet the basic requirements of the statute (*id.* 23a-25a). Accordingly, EPA explained that states could shift to a plantwide definition only if they could "demonstrate that their plans, as revised, continue to demonstrate [reasonable further progress] and attainment"—the fundamental statutory requirements (82-1247 Pet. App. 24a).

4a. On November 18, 1981, the Natural Resources Defense Council ("NRDC"), Citizens for a Better Environment, Inc. and the Northwestern Ohio Lung Association, Inc., filed a petition for review of the EPA's October 1981 regulations in the United States Court of Appeals for the District of Columbia Circuit.[13] NRDC argued that the amended definition was in-

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[12] The PSD program is designed to prevent the deterioration of air quality in areas in which ambient air is cleaner than required by national standards. The agency adopted a plantwide definition of "stationary sources" for PSD purposes at the same time it adopted the dual definition for nonattainment new source review. Maintenance of disparate definitions was deemed burdensome by EPA because an area may be designated "attainment" for one pollutant and "nonattainment" for another, and a single plant may therefore be subject to both sets of rules.

[13] Under Section 307(b)(1) of the Act, 42 U.S.C. (Supp. IV) 7607(b)(1), the D.C. Circuit has exclusive jurisdiction to entertain actions for judicial review of nationally applicable regulations promulgated by EPA.

valid for three reasons. First, it was alleged to conflict with what NRDC characterized as a longstanding congressional understanding that the term "source" comprehended each item of process equipment within a plant. Second, NRDC argued that EPA's plantwide definition conflicted with the fundamental purposes of the nonattainment program because it exempted from new source review many new facilities that would be subject to review under the dual definition. Third, NRDC contended that under prior decisions of the D.C. Circuit, use of a plantwide source definition was permissible only for programs intended for air quality maintenance and was forbidden for programs directed at air quality enhancement, such as the nonattainment program established in 1977 in Part D of the Clean Air Act.

In response, EPA observed first that neither the statute nor the legislative history prescibed a particular definition of "source". The agency argued further that there was no evidence of a settled or clear congressional understanding of the term. EPA contended that given the absence of controlling language or legislative history, adoption of the plantwide definition was a reasonable exercise of its discretion. EPA argued that its regulations carried out Congress' intention that economic growth be allowed to occur in nonattainment areas to the extent consistent with the drive toward attainment and the deadlines for attainment established by the 1977 Amendments. Finally, EPA argued that the D.C. Circuit's previous decisions cited by NRDC were inapposite because the regulatory programs considered in those decisions were substantially different in design and purpose from the Part D new source review program.

b. The court of appeals granted the petition for review and vacated EPA's October 14, 1981, regulations (82-1005 Pet. App. A-20). The court did not respond directly to EPA's contentions; nor did it rely on the primary arguments advanced by NRDC. The court acknowledged (82-1005 Pet. App. A-8, A-17 note 39) that (as EPA contended) neither the statutory language nor the legislative history prescribed any definition for the term "stationary sources." The court nevertheless concluded that two of its prior decisions, *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (1978) and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (1979), required rejection of the Agency's regulations. Those decisions, in the court's view, together established (82-1005 Pet. App. A-16; emphasis added)

> a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept * * * is *mandatory* for Clean Air Act programs designed merely to maintain existing air quality; *it is inappropriate* * * * in programs enacted to improve the quality of ambient air.

Pretermitting any view as to "the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment" (*id.* at A-4 note 7), the court summarily concluded that because the overall objective of the entire *nonattainment program* was to ameliorate air quality so as to achieve conformity with national air quality standards, a plantwide definition of the term source may not in any circumstances be employed for purposes of the new source review program (*id.* at A-17 to A-18). The court deemed irrelevant to its consideration evidence that Congress intended to allow the states a substantial measure of flexibility in achieving the required air quality standards, and the fact that the

new source review program is but one facet of the larger nonattainment program (*id.* at A-18 to A-19). These considerations were thought not to reflect the controlling purpose of the nonattainment program. The court stated (*id.* at A-19)

> In the *Alabama Power-ASARCO* context, "purpose" clearly means goal, objective. The goal of the nonattainment program is undoubtedly to improve air quality in regions lagging behind in meeting the NAAQSs.

In the court's view that purpose precluded use of the plantwide "stationary source" definition.[14]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is contrary to well established limits upon the scope of judicial review of administrative action. Remarkably, the Agency's regulation was invalidated even though the court of appeals acknowledged that it was unable to discern any controlling statutory language or legislative history. In the circumstances, the agency acted well within its authority, Section 301(a)(1), 42 U.S.C. (Supp. IV) 7601(a)(1), to promulgate regulations to carry out the purposes of the Act. And the court of appeals was without authority to invalidate the agency's regulations so long as they rested upon a reasonable interpretation of the Act. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86 (1975).

Instead of pointing to any controlling statutory language or legislative history, the court of appeals'

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[14] The court also invalidated EPA's deletion of the reconstructed facilities rule, (See *supra* p. 8 notes 10 & 11) reasoning that that aspect of the agency's action depended upon its adoption of the plantwide source definition (82-1005 Pet. App. A-19 to A-20).

decision rests upon a bright line rule ostensibly established by its prior decisions, the application of which turns upon the overall purpose of the statutory program. But in the setting of this case the purpose attributed to Congress is entirely an artifact—it does not rest upon statutory language or legislative history, and thus reflects only the policy judgment of the court of appeals. And the dichotomy applied by the court of appeals caused it to reject as irrelevant critical features of the actual statutory design. Thus, while the ultimate purpose of the nonattainment program as a whole is assuredly to achieve an improvement in ambient air quality, that mandate for improvement is not open-ended; the statutory objective is attainment of specific air quality standards. Moreover, the new source review program is merely one of an arsenal of tools which Congress required the states to employ in the pursuit of those standards. The statute and legislative history make clear that the states were to have substantial discretion as to how the specific tools made available under the Act were to be balanced in a state implementation plan. The court of appeals' conclusion that the air quality improvement purpose of the nonattainment program required adoption of a particular definition of a term Congress did not define is accordingly unsound.

This Court has recognized that Congress intended in the Clear Air Act to allow the states substantial discretion in selecting the measures necessary to meet the air quality improvement goals established by Congress and the Agency. *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 79. The decision of the court of appeals, however, requires the Agency to disapprove implementation plans submitted by 31 states even if they meet all of the requirements

of the Clean Air Act, simply because they provide for attainment through strategies that accommodate a plantwide approach to new source review. Absent a compelling indication that Congress constrained the agency to reject such plans—and none has been identified in this case—that is an impermissible result.

The question presented is of substantial national importance, affecting the regulatory agencies of 31 states, and thousands of businesses subject to their jurisdiction. Because exclusive jurisdiction in this matter is by statute vested in the D.C. Circuit (save only for this Court), and because that court declined to reconsider its decision en banc, further review is warranted.

1. The decision of the court of appeals significantly alters the historic federal-state relationship created by Congress to deal with air pollution, by depriving the states of flexibility to determine how they will achieve the primary national ambient air quality standards.

a. From the first congressional efforts in 1955 to abate the problems of air pollution, Act of July 14, 1955, ch. 360, 69 Stat. 322, to the present, the individual states have been vested with primary responsibility for the control and prevention of air pollution at its source. This was so under the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, and under the comprehensive amendments adopted by Congress in 1970, Pub. L. No. 91-604, 84 Stat. 1676. Although the 1970 amendments sharply increased the federal responsibility for air pollution control, they explicitly preserved the principle of state responsibility: "[E]ach State shall have primary responsibility for assuring air quality within the entire geographic area comprising such State * * *." Section 107(a),

42 U.S.C. 1857c-2(a) and 42 U.S.C. (Supp. IV) 7407(a).[15] This Court described the federal-state partnership in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. [Footnote omitted.]

Congress did not abandon this principle in enacting the 1977 Amendments to the Act. In Part D to the 1977 Amendments, 42 U.S.C. (Supp. IV) 7501-7508, Congress developed a detailed strategy requiring the revision of all state implementation plans for those areas of the country that were not yet in attainment. As the House noted, Part D had "two main purposes:"

> (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) *to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford.*

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 221 (1977) (emphasis added). In addition, the Senate stated that a "fundamental concern" was "[t]he need to augment the responsibility, authority, and effective-

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[15] See also Section 101(a)(3), 42 U.S.C. 1857(a)(3) and 42 U.S.C. (Supp. IV) 7401(a)(3): "the prevention and control of air pollution at its source is the primary responsibility of States and local governments."

ness of State and local air pollution control programs" because "[t]he problem of air pollution exists at the State and local level [which] is where the public understands the problem [and] where the resources must be directed." S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977). Accordingly, Congress amended the Act to give the states "additional time and flexibility" (*id.* at 3) to revise their plans in order to attain the ambient standards and meet the new requirements of Section 172(b), 42 U.S.C. (Supp. IV) 7502(b). As the Senate noted (S. Rep. No. 95-127, *supra*, at 10):

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare, prevent discrimination among States, protect national resources within States, and provide guidance on the technical and the economic implications of various national policies * * *.
>
> Proper implementation of the amendments in this bill will significantly enhance the Federal-State relationship and will provide the States and localities with the flexibility they need, while at the same time providing a mechanism to assure that national policy is implemented.

Thus, it is clear that the Act and its legislative history reflect the continuing intention to leave states considerable latitude in achieving the mandated emission reductions, both generally and with specific reference to the nonattainment program of Part D.

b. The court of appeals decision strips the states of significant latitude in applying Part D in their efforts to achieve attainment. As promulgated by EPA, the plantwide definition of source is an optional strategy that the states may, but need not, select, and that is available only under carefully limited circumstances. In adopting a plantwide definition of source for this program, the Agency has acted in keeping with the Act. As promulgated by EPA, the plantwide definition of source is available to the states only if they "demonstrate that their plans, as revised, continue to demonstrate [reasonable further progress] and attainment," and thus continue to satisfy the basic statutory requirements (82-1247 Pet. App. 24a). And the plantwide definition does not permit construction or modification of a process unit unless any increased emissions are offset by decreased emission from another component within the same facility so that aggregate emissions do not increase beyond a de minimis level. Thus, the plantwide definition gives states the flexibility and the authority to determine how to structure their new source review programs. Yet, it insures that the states remain subject to the overriding statutory command that their state implementation plans satisfy the requirements established by Congress.[16]

There is no suggestion in the court of appeals' opinion that by employing the plantwide definition for

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[16] Promoting state flexibility is not an abstract concern. In several areas around the country the major cause of nonattainment is automobile-related pollutants (carbon monoxide and ozone) and not stationary source emissions. Only by reducing automobile emissions can attainment be expected in

new source review, the states would be unable to demonstrate achievement of the attainment goals established by Congress. The court apparently deemed that question irrelevant (82-1005 Pet. App. A-18 to A-19). Instead, the panel faulted the Agency for conferring undue flexibility upon the states. Contrary to the court of appeals' suggestion (*id.* at A-19), however, the Agency's regulations do not allow the states to determine *whether* federal requirements such as new source review should be applied. The issue, of course, is not whether a state must have a new source review program as part of its revised state implementation plan. Clearly it must. Rather, the question is whether the states may be allowed to determine the scope to be afforded that program and latitude to employ those strategies they find most effective in meeting the attainment goal established by Congress, when the statutory language does not require a particular choice of strategy. *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 69; and *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266 (1976), strongly suggest that such latitude exists under the Act. The court of appeals' decision, however, compels EPA to disapprove any SIP employing a plantwide definition, even where the state has demonstrated that an equipment-specific definition of source is not necessary to insure timely

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such areas. Hence, it makes little sense to force a state to expend its resources performing full-blown reviews of modifications of stationary sources when such review will have little material impact on ambient air quality. It is far more fruitful to allow such a state to focus its energies on more productive pollution reduction endeavors. The plantwide definition of source allows for precisely this sort of flexibility.

attainment of the standards. The result is plainly contrary to congressional intent, and this Court's decisions.

2. In repudiating the Agency's definition of source for failing to satisfy the "purpose" of the nonattainment program, the court of appeals violated established principles of judicial review. This Court has "accorded great deference to the Administrator's construction of the Clean Air Act." *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 256. The Agency's interpretation of the Act need only be "sufficiently reasonable" to survive judicial scrutiny. *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 87. These principles apply with special force, we submit, when Congress has given no guidance on an issue that the Agency is perforce obliged to address. See *FCC* v. *National Citizens Committee For Broadcasting*, 436 U.S. 775, 813-814 (1978).

The decision below is irreconcilable with these fundamental tenets of judicial review. The court acknowledged that neither the statutory text nor its legislative history offered any clear guidance respecting the meaning to be assigned to the term "stationary sources" (82-1005 Pet. App. A-8, A-17, n.39). Yet, the Agency's effort to fill this statutory vacuum was rejected because it was thought to be out of harmony with the larger purpose of the nonattainment program as a whole. Both the court's analytical approach and its understanding of the Clean Air Act were seriously flawed.

a. According to the court of appeals, for the purpose of defining a source, every program under the Clean Air Act has one of two purposes: enhancement of air quality or maintenance of existing air quality. In the court's view, if the provisions of the Act for

which a plantwide definition have been proposed fall on the enhancement side of this "bright line," such a definition is *precluded.* If the provisions for which the definition has been proposed pertain to maintenance, the definition is *mandatory.* Just as the court's decision deprives states of flexibility in implementing a key provision of the Act, it also strips the Agency of any discretion to interpret it. As a result of the court's test, the Agency never has any discretion to define what a source is—a remarkable conclusion given Congress' silence on the subject.

The application given this judicial litmus test is unacceptable for two additional reasons. First, the court of appeals did not even suggest that the result of its application conforms to congressional intent, which, of course, is the proper standard for determining the validity of the agency's regulations. The court's insistence that its decision was compelled by a "bright line" test derived from its other decisions should not be permitted to disguise the fact that the court's decision, because not based on legislative intent, represents a departure from the "narrow confines of the law into the more spacious domain of policy" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941)).

Second, the court of appeals' reasoning rides roughshod over the statutory design. The new source review program is but one component of the larger nonattainment program. The nonattainment program itself requires improvement of air quality to meet fixed standards; it is not a mandate for the maximum feasible reduction in emissions. Accordingly, it simply does not follow from the overall ultimate purpose of the nonattainment program that new source review must be applied on a unit-by-unit basis rather than a plantwide basis. Thus, EPA's 1981 regulations

are fully consistent with the purpose of the nonattainment program as reflected in the statutory language itself.

b. The court of appeals' prior decisions in *ASARCO* and *Alabama Power* do not support its decision in this case. In each of those cases the court of appeals undertook to determine whether a plantwide definition of sources subject to a particular Clean Air Act program was consistent with legislative intent. In *ASARCO*, the court of appeals concluded that application of a plantwide approach under the technology-based new source performance standards (NSPS) program was contrary to legislative intent. 578 F.2d at 327-329.[17] In *Alabama Power*, by contrast, the court held that use of a plantwide definition was mandatory under the Prevention of Significant Deterioration (PSD) program because Congress intended sources to undergo review "only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Alabama Power*, *supra*, 636 F.2d at 401.

Although the D.C. Circuit took pains in *Alabama Power* to distinguish its holding there from its prior holding in *ASARCO*, it did not do so on the basis of the "bright line" test suggested by the panel here. The distinction recognized was tied instead to fundamental differences in regulatory design between the NSPS and PSD programs. This was not the simplistic dichotomy between air quality enhancement and maintenance constructed by the panel in this case. Rather, the distinction observed was between the

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[17] The new source performance standards program was created by Section 111 of the Act in 1970, see 42 U.S.C. 1857c-6 and 42 U.S.C. (Supp. IV) 7411, and applies irrespective of the air quality of an area.

technology-forcing design of the NSPS program, which requires the installation of stringent emission controls on new emission producing equipment *without regard to existing air quality, see ASARCO, supra*, 578 F.2d at 328-329, and the intent of the PSD program, which is concerned with the impact of new source construction on existing air quality. *Alabama Power, supra*, 636 F.2d at 401.

Differences between the NSPS program and the nonattainment new source review program are of critical significance here. As discussed above, the NSPS program is a technology-based program that applies without regard to the impact of a regulated facility's emissions on ambient air quality. NSPS requirements apply whether or not ambient standards have been attained and continue to apply for the life of the plant. The NSPS program employs a single means: a long-term, technology-forcing program designed to increase the pollution control efficiency of industrial plants as capital stock is replaced. In contrast, the nonattainment new source review program is inextricably linked to ambient air quality. It is called into play only in those areas in which national ambient air quality standards have not been attained, and its application terminates when the standards have been achieved.[18] In addition, the nonattainment

[18] The panel declined to distinguish between the NSPS program and the nonattainment new source review program, noting that the latter program contains a technology-forcing component as well (82-1005 Pet. App. A-16 n.38). What the court failed to realize is that the PSD program also contains a technology-forcing component. See Section 165(a)(4), 42 U.S.C. (Supp. IV) 7475(a)(4). Hence, the mere existence of a technology-forcing component is no basis for rejecting the suggested distinction. The issue is not whether a program contains a technology-forcing component, but *when* the program, with its technology-forcing component, should be triggered. In the Agency's view, the Part D new source review

program employs several different strategies, of which new source review is but one, to ensure attainment of the national standards.[19]

The decision of the court of appeals in this case is thus unsupported by the rationale of its prior decisions. In place of the analysis employed in the court's prior decisions, which focused upon congressional intent, the court has now drawn an arbitrary line that does not respond to actual legislative intent, and that allows no room for exercise of administrative discretion in circumstances, such as those presented, where Congress has not confined the Agency in its implementation of the Act.

3. The issue presented by this case is of substantial practical importance, for, pursuant to the Agency's regulations, 31 states have sought to adopt a plantwide approach to new source review. Under the court of appeals' decision, however, the Agency is compelled to disapprove those states' SIPs and to require the submission of revised versions that return to a dual definition of source. If new source review may not be conducted on a plantwide basis, each state will be required to carry out time-consuming preconstruction

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program, like the PSD program, should be triggered only when emissions will increase by more than a de minimis amount.

[19] See *supra* p. 5. The provisions of the nonattainment program directed at reduction of existing excessive emissions were necessarily the primary instrument adopted for achieving attainment. The new source review program was never intended to carry the full load of insuring attainment of the national standards; on the contrary, it was principally designed to make certain that emissions from new or modified sources do not undercut a state's affirmative attainment strategy.

review of individual modifications to existing plants, even if the state demonstrates, and EPA finds, that such reviews are not necessary to ensure attainment and maintenance of the national standards. Moreover, in adopting the 1981 regulations, the agency determined that the plantwide definition would remove disincentives to plant modernization (82-1247 Pet. App. 26a). The decision of the court of appeals may accordingly have adverse economic impacts that are not required by the terms of the Clean Air Act.

Finally, review by this Court is necessary because there is no possibility of litigating the issue further in another court of appeals. Pursuant to Section 307(b)(1), 42 U.S.C. (Supp. IV) 7607(b)(1), the D.C. Circuit has exclusive jurisdiction to review EPA regulations of nationwide applicability. Further review is available only in this Court.

To be sure when Congress revisits the Clean Air Act, it may speak to this issue and provide a definition for the term at issue in this case. But given Congress' failure to act in the past, uncertainty as to whether and when it will act in the future, and the present importance of the issue, review by this Court is warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our petition we explain that the court of appeals' decision, interpreting the term "stationary source" in the new source review provisions of the Clean Air Act, represents a significant breach of established limits on the scope of judicial review of administrative action. We also show that the decision is inconsistent with the congressional design vesting the States with substantial discretion to determine what mix of nonattainment program strategies best serves their needs while assuring that the required degree of pollution abatement will be achieved. The court of appeals acknowledged (82-1005 Pet. App. A8, A9 n.22, A17 n.39) its decision was unsupported by pertinent statutory language or legislative history. The only basis for its decision thus was its own conclusion that treating each emission-producing unit as a separate source would be most compatible with the overall air quality improvement objectives of the nonattainment program (*id.* at A17 to A18).

Remarkably, respondents make no serious effort to defend the court of appeals' analysis in this case. Rather, they assert the following alternative rationales: (1) the pertinent statutory language bars the Administrator from approving any state implementation plan using a plant-wide approach to new source review for nonattainment areas (Br. in Opp. 15-16), and (2) the legislative history of the 1977 Amendments to the Clear Air Act demonstrates that Congress intended that each unit be treated as a stationary source (Br. in Opp. 16-21).

1. Respondents claim (Br. in Opp. 10, 15-16) that the 1977 Clean Air Act Amendments *do* "determine" (Br. in Opp. 10) the meaning of the term "stationary source" employed in Section 172(b)(6) of the Act, 42 U.S.C. (Supp. IV) 7502(b)(6), which establishes the new source review requirement. But the definition respondents point to (Br. in Opp. 15), Section 111(a)(3) of the Act, 42 U.S.C. (Supp. IV) 7411(a)(3),[1] explicitly provides that it is effective only "[f]or purposes of *this section*" (emphasis added). "[T]his Section" — Section 111—establishes the new source performance standards ("NSPS") program; it has no application to the nonattainment program or its component new source review requirement. The NSPS program is applicable to new sources without regard to the air quality of the region in which a source is located, and was enacted in 1970. See 42 U.S.C. 1857c-6. Accordingly, the Section 111 NSPS definition of "stationary source" simply is not controlling for purposes of the nonattainment program established in 1977 to cover selected regions of the nation.[2]

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[1]Section 111, 42 U.S.C. (Supp. IV) 7411 provides in pertinent part:

> (a) For purposes of this section
>
> * * * * *
>
> (3) The term "stationary source" means any building, structure, facility or installation which emits or may emit any air pollution.

[2]The decisions of the Fourth and Ninth Circuits cited by respondents (Br. in Opp. 5-6 & n.10) concern the NSPS program rather than the nonattainment program, and were, as respondents concede, controlled by the D.C. Circuit's decision in *ASARCO Inc.* v. *EPA*, 578 F.2d 319 (1978). They do not address the issue in this case.

Significantly, in establishing the nonattainment program in 1977 Congress did adopt by reference the NSPS program definition of the terms "modification" and "modified" that are also used in the new source review program. See Section 171(4), 42 U.S.C. (Supp. IV) 7501(4), incorporating by reference Section 111(a)(4), 42 U.S.C. (Supp. IV) 7411(a)(4). By contrast, the 1977 Congress did not adopt the NSPS definition for the term "stationary source"; nor did it prescribe a separate definition (see pages 4-7, *infra*).[3] Nor is the term "stationary source" to be found among the phrases defined for purposes of the Clean Air Act as a whole in Section 302, 42 U.S.C. (Supp. IV) 7602. Respondents' assertion that Congress has defined the term in a manner that deprives the Administrator of discretion to promulgate regulations offering the States the option of employing a plant-wide approach to new source review is thus simply incorrect.[4] Respondents' contention that Congress prescribed a definition for the term at issue here is in fact diametrically opposed to the court of appeals' conclusion

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[3]In Section 171, 42 U.S.C. (Supp. IV) 7501, Congress did define several other terms of art used in the statutory provisions governing the nonattainment program.

[4]Respondents have recast the question presented and framed much of their discussion as though the Administrator had required the States to adopt a plant-wide approach to new source review. See *e.g.* Br. in Opp. i, 24-26. As explained in the petition (at 17) the use of a plant-wide approach to new source review instead of the more intrusive equipment unit-specific approach preferred by respondents is merely an option made available to the States. Moreover, this option is available only to those States that can show that their SIPs embracing it provide for the required amelioration of air quality.

Respondents also err in suggesting (Pet. 9, 15) that the regulations invalidated by the court of appeals represent a departure from long-standing practice. As explained in our petition (at 7) the rules that were replaced by those under review in this case themselves represented a change of the agency's original position on this issue. Because there could have been no occasion for the agency to formulate any position on the proper interpretation of the 1977 Act before 1977, respondents' suggestion (Br. in Opp. 9) that the unit-specific definition had been in place since 1971 is simply inaccurate.

that "Congress * * * supplied none" (82-1005 Pet. App. A9 n.22).[5]

2. Reviving another contention rejected below, respondents argue here (Br. in Opp. 16-21) that the legislative history of the 1977 Clean Air Act Amendments dictates that new source review be conducted on a unit-specific (rather than a plant-wide) basis. As noted, the court of appeals was persuaded to the contrary that " 'the legislative history is at best contradictory' " (82-1005 Pet. App. A17 n.39, quoting government's brief). In fact, the convoluted legislative history of the new source review requirement, compiled during the course of two different Congresses, does not directly address the question presented here and does not support the court of appeals' judgment.

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[5]The court of appeals did suggest (82-1005 Pet. App. A9 n.22), following its analysis in *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 395-396 (D.C. Cir. 1979), that in the absence of any statutory definition it was appropriate to look to the NSPS definition, Section 111(a)(3). But, as in *Alabama Power* itself, the court's observation was made subject to the caveat that

> EPA * * * has authority to define the constituent terms of source enumerated in [Section 111(a)(3)] ("building, structure, facility or installation") in a manner that will best effectuate "the expressed purposes of the Act."

82-1005 Pet. App. A9 n.22, quoting *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 396. Indeed, that is precisely what the agency has done. The term "stationary source" is defined in the new source review program regulations using the language of Section 111(a)(3), while the constituent components of that definition are themselves defined so as to authorize a plant-wide approach to new source review. 40 C.F.R. 51.18(j)(1)(i) and (ii); see also 40 C.F.R. 52.24(f)(1) and (2).

In this case the court of appeals correctly recognized that reference to Section 111(a)(3) cannot obviate or alter the basic inquiry: to determine the contours of the new source review program established in Section 172(b)(6) by Congress. Regrettably, the court of appeals failed to appreciate that because Congress nowhere expressed any intention to limit the Administrator's discretion to frame the necessary definition, its decision necessarily substitutes a judicial conception of what the public interest requires for the Administrator's judgment.

A critical link in respondents' argument is the 1977 Senate version of a bill to amend the Clean Air Act (see Br. in Opp. 16-17, 20-21). Respondents assert that the Senate in 1977 contemplated unit-by-unit new source review. Assuming that this is correct,[6] the strongest evidence for it in any event is the fact that the Senate bill adopted the NSPS definition of the term "stationary source" for all purposes under the Act (see pages 2-4, *supra*).[7] However, as previously noted, Congress ultimately chose not to make that definition applicable to the new source review requirement. Accordingly, any inferences that might be drawn about the Senate's intent in 1977 provide no insight into the meaning of the final legislation.

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[6]Such an assumption is not necessarily warranted. Respondents' description of the 1977 Senate bill and its legislative history is incomplete, and therefore misleading. The particular new source review requirements of the 1977 Senate bill (derived from the 1976 Senate bill) that are described by respondents were merely an interim measure, to be applied prior to July 1, 1979. See S. 252, 95th Cong., 1st Sess. § 13(a) (1977), adding Section 113(g)(1) to the Act, *reprinted in* Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., [3] *A Legislative History of the Clean Air Act Amendments of 1977* at 630-634 (Comm. Print 1978) (hereinafter "*Leg. Hist.*"); S. Rep. No. 95-127, 95th Cong., 1st Sess. 54-56 (1977), *reprinted in* 3 *Leg. Hist.* at 1428-1430. The Senate adopted a different approach to be applied after that date, permitting construction of new or modified facilities in nonattainment areas providing that the State had in effect an approved revised implementation plan formulated in response to the amendments. In order to secure approval for such a revised SIP, a State would have been required to demonstrate, *inter alia*, that it provided for attainment of the mandated national air quality standards by the end of 1982, required major new or modified facilities to employ state-of-the-art emissions control technology, and provided for sufficient emission reductions from existing sources by 1982 to compensate for added emissions from new facilities and permit timely attainment of applicable air quality standards. S. 252, *supra*, § 13(b), amending Section 110(a)(3)(A)(iii) of the Act, *reprinted in* 3 *Leg. Hist.* at 635-636; S. Rep. No. 95-127, *supra*, *reprinted in* 3 *Leg. Hist.* at 1428-1430. Accordingly, the bearing of the legislative history respondents discuss upon the scope of new source review intended to be required by the Senate after 1979 is far from clear.

[7]S. 252, *supra*, § 39, adding Sections 302(k) and (m) to the Act, *reprinted in* 3 *Leg. Hist.* at 684-686.

Indeed, the new source review requirements of the Clean Air Act Amendments of 1977 as they emerged from the Conference Committee were derived primarily from the *House bill*, rather than the Senate bill. The House bill called for revised SIPs providing for attainment of air quality standards by 1982 (with extensions of that date to 1987 available for certain pollutants) and reasonable further progress in the interim; it also required establishment of a permit program to govern construction and operation of "new or modified stationary sources" similar to the new source review requirement ultimately enacted.[8] The House bill did not define the term "stationary source"; and we are unaware of any indication in the bill or its legislative history—and respondents have cited none—that this new source review program was to be applied to each unit of process equipment rather than on a plant-wide basis.

The new source review provisions of the bill that emerged from the Conference Committee are primarily derived from the 1977 House bill.[9] Like the House bill, but unlike the

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[8]H.R. 6161, 95th Cong., 1st Sess. § 117 (1977), adding Section 127(c)(2), (3) and (8) and (d), *reprinted in* 4 *Leg. Hist.* at 2332, 2333, 2335-2339; H. R. Rep. No. 95-294, 95th Cong., 1st Sess. 13-14 (1977), *reprinted in* 4 *Leg. Hist.* at 2480-2481.

In lieu of the interim new source review provisions adopted by the Senate (see page 5 note 6, *supra*) the House bill continued in effect on a temporary basis EPA's Offset Ruling, 41 Fed. Reg. 55524 (1976). H.R. 6161, *supra*, § 117, adding Section 127(b)(2) to the Act, *reprinted in* 4 *Leg. Hist.* at 2331-2332; H.R. Rep. No. 95-294, *supra*, at 14, *reprinted in* 4 *Leg. Hist.* at 2481. The Offset Ruling was an interpretive rule, promulgated by the agency when Congress' efforts to amend the Act in 1976 had failed, that set forth conditions under which new sources could be constructed in nonattainment areas, pending further legislation.

[9]The Conference bill adopted the EPA's Offset Ruling, with certain modifications, as the basis for governing new source construction in nonattainment areas prior to July 1, 1979. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 129(a), 91 Stat. 745. Both the general nonattainment area requirements (Section 172 of the Act, 42 U.S.C. (Supp. IV) 7502) and the specific new source review provision

Senate bill, the key term "stationary source" was left undefined. The Conference Committee Report clearly reflects the origin of the new source review provisions:

> All implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill.

H.R. Rep. No. 95-564, 95th Cong., 1st Sess. 157 (1977), *reprinted in* 3 *Leg. Hist.* at 537. And respondents point to nothing in the legislative history that supports their claim that the Conference bill precluded the Administrator from approving SIPs employing a plant-wide new source review mechanism. Thus the court of appeals correctly concluded that the legislative history cited by respondents does not support their contention that Congress foreclosed this option.

3. Respondents appear to suggest (Br. in Opp. 4 & n.9) that plantwide new source review permits repeated substantial net increases in the air pollution emissions of a single plant. This contention is doubly unfounded. First, the applicable regulations require aggregation of successive emissions increases over a reasonable time period for the purpose of determining whether any given modification of a major pollution source is subject to new source review. See 40 C.F.R. 51.18(j)(1)(vi)(a) and (b); see also 40 C.F.R. Part 51 App. S II(A)(6) (aggregation over a five-year period under Offset Ruling); 40 C.F.R. 52.24(f)(6) (aggregation over a five-year period under moratorium program).[10] Second,

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(Section 173 of the Act, 42 U.S.C. (Supp. IV) 7503) generally follow the provisions of the House bill.

Respondents appear to suggest (Br. in Opp. 16-17, 19) that because the 1976 Offset Ruling assumed that new source review would occur on a unit-by-unit basis the 1977 Amendments to the Act should be interpreted to require the same. There are two major flaws in this reasoning. First, Congress adopted the Offset Ruling only for the period prior to July 1, 1979. Second, Congress made clear that the Administrator remained free to "modif[y] by rule" the requirements of the Offset Ruling Clean Air Act Amendments of 1977, Section 129(a)(1) (91 Stat. 745).

[10]See also 45 Fed. Reg. 52698, 52701 (1980).

any quarrel that respondents might have with the administrator's particular de minimis threshold amounts is outside the scope of this proceeding. These significance thresholds were established by regulation, 40 C.F.R. 51.18(j)(1)(x), pursuant to the mandate of the court of appeals in *Alabama Power Co.* v. *Costle, supra*, 636 F.2d at 399-400, 405, see 45 Fed. Reg. 52705-52710 (1980), and were not challenged by a timely petition for review. Intelligent evaluation of these threshold significance levels requires understanding of their relative magnitude compared to typical industrial emissions levels.[11] Absent the detailed record compiled for the administrative decision that is considered upon a petition for review any effort to second-guess the agency's expert judgment is impermissible.[12]

4. Respondents argue (Br. in Opp. 24-26) that the expiration of the 1982 deadline fixed by the 1977 Amendments for attainment of air quality standards without attainment having been achieved in many regions of the nation demonstrates the invalidity of the regulations authorizing a plant-wide approach to new source review, and militates against further review. Respondents' argument rests upon several unsupported premises. They seem to assume that use of a plant-wide approach either caused various regions to fail to

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[11]In fact, the threshold significance levels are extremely modest. For instance, the de minimis level for sulfur dioxide is 40 tons per year. 40 C.F.R. 51.18(j)(1)(xiii); 40 C.F.R. 52.24(f)(13). If a thousand plant modifications resulting in additional pollution of a magnitude just below this significance threshold occurred in the entire United States in a year, the aggregate additional emissions could not exceed 40,000 tons per year. By contrast, in 1978 total sulfur dioxide emissions in the United States were 29.7 *million* tons. National Commission on Air Quality, *To Breathe Clean Air* 288 (Table 47) (1981). The additional emissions permissible in this hypothetical would represent an increase of .13% over the preexisting level.

[12]The administrative record makes clear that the agency considered the effect of numerous separate de minimis emissions increases upon air quality in fixing the significance thresholds. 45 Fed. Reg. 52708 (1980).

attain the required degree of air quality improvement or now prevents those regions from achieving that improvement. In fact, there is no reason to believe that there is any association between the source definition in force for new source review purposes in a given region and success or failure in achieving air quality improvement. Only thirty-nine of the 111 nonattainment areas tentatively identified by EPA have ever had in force an EPA-approved plant-wide new source review procedure. The remaining nonattainment areas have remained subject to unit-specific new source review—yet still failed to meet the Act's requirements.[13]

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[13]Respondents' argument also proceeds as though the Administrator's regulations would permit construction of new stationary air pollution sources to proceed as before in areas that did not meet the 1982 deadline. On the contrary, pursuant to Section 110(a)(2)(I), 42 U.S.C. (Supp. IV) 7410(a)(2)(I), the Administrator has proposed to activate the moratorium required by the Act on construction or modification of major sources of air pollutants in areas with excessive concentrations of those pollutants. 48 Fed. Reg. 4972 (1983).

Respondents' quarrel (Br. in Opp. 25 n.55) with EPA's conclusion that a moratorium is required by law is outside the scope of this litigation. In any event, whether or not respondents agree with the agency's position on that score, the Administrator has responded affirmatively to insure that new facility construction cannot exacerbate air quality deficiencies in nonattainment areas.

We note that EPA's position that a moratorium is required rests on a straight-forward reading of the statute. Under the Clean Air Act a construction moratorium must be imposed on areas whose SIPs do not "meet [] the requirements of part D" of the statute. Section 110(a)(2)(I), 42 U.S.C. (Supp. IV) 7410(a)(2)(I). One of those requirements is that the SIP "provide for" attainment by the end of 1982. Section 172(a)(1), 42 U.S.C. (Supp. IV) 7502(a)(1). See 48 Fed. Reg. 4974 (1983).

The applicability of the moratorium to nonattainment areas does not moot this case. As explained in the petition (82-1591 Pet. 6) the regulations in dispute govern the scope of the moratorium as well as new source review. Moreover, for those areas that have secured an extension of the 1982 deadline for meeting air quality standards for ozone and carbon monoxide until 1987, pursuant to Section 172(a)(2) of the Act, 42 U.S.C. (Supp. IV) 7502(a)(2), the question of the scope of new source review continues to be of substantial importance. Of course, if respondents' contention that the statute does not impose a moratorium in the present circumstances were correct, the scope of new source review would be of even greater practical importance.

5. Respondents' argue (Br. in Opp. 23-24) that the question in this case should be left to Congress. But Congress, in enacting the 1977 Clean Air Act Amendments, left the task of defining "stationary source" to the agency—a delegation the court of appeals failed to respect. In any event, there can be no confident prediction that Congress will act one way or another on this point in the near term. Indeed, just like the 94th Congress, which proved unable to produce amendments to the Act in 1976 in the face of a similar nonattainment situation, the 97th Congress proved unable to legislate on this subject in 1982. The Senate bill respondents cite did not see floor action; the House Committee did not even report out a bill. Thus the views expressed in the Senate Report upon which respondents rely (Br. in Opp. 24) do not represent the intentions of the 97th Congress, much less those of the 95th Congress that adopted the provisions in controversy, and provide no basis for allowing the erroneous decision of the court of appeals to stand.

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1983

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Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 82-1591

IN THE

Supreme Court of the United States

October Term, 1983

Administrator, Environmental Protection Agency,
Petitioner,

v.

Natural Resources Defense Council, Inc., *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 36 of the Supreme Court Revised Rules, the American Gas Association (A.G.A.) hereby respectfully requests permission to file its brief *amicus curiae* in support of the Petitioner, the Administrator of the Environmental Protection Agency (EPA), in the above-captioned case. A.G.A.'s motion is required because consent to the filing of the brief *amicus curiae* has been withheld by a single party, Chevron USA Inc. (which is also the petitioner in No. 82-1005).

A.G.A. is a national trade representative for approximately 300 member companies active in either the local distribution or pipeline transmission of natural gas. Serving approximately 160 million consumers, member companies provide 85 percent of the nation's natural gas utility sales.

This case involves the interpretation of language included in the 1977 Amendments of the Clean Air Act which can have an impact on the fuel consumption decisions of certain industrial plants. Approximately 53 percent of the sales of natural gas by A.G.A. member companies are made to industrial users,

including electric utilities which use the gas in the generation of electricity. Consequently, this case is of immediate and substantial interest to our member companies.

Under Part D of the Clean Air Act as amended, states which had not, by 1977, met national air quality standards established by the EPA were directed, among other things, to require permits for the construction of "new or modified major stationary sources" of air pollution in "non-attainment areas". In October, 1981, the EPA adopted a regulation for Part D which permitted states for purposes of reviewing "new or modified major stationary sources" to utilize a "plantwide" definition of "stationary sources" that treats an industrial plant as a single source. Such a definition is an example of the application of a "bubble" concept. As demonstrated below, the bubble concept can also be applied to existing source situations with the same beneficial results as result from use of the plantwide definition for new source review. The EPA's regulation allows involved industrial concerns to burn concurrently natural gas and less environmentally benign fuels in order to derive the maximum benefits of the clean-burning characteristics of natural gas (i.e. the "select use" of natural gas). The application of the select use concept to existing sources may be extremely simple, involving no more than the switching, for example, for low sulphur to high sulphur oil in one unit, while offsetting this conversion with a change from low sulphur oil to gas in the nearby unit. Thirty-one states or jurisdictions have to date utilized the plantwide source definition and have sought to modify their state implementation plans required under the Act to incorporate that approach.

A.G.A. submits that EPA correctly concluded that states should have discretion to define "stationary source" on a plantwide basis providing their state implementation plans meet the basic requirements of the statute. One practical impact of the EPA's decision, an impact not dealt with below by the parties, is to afford the nation the variety of benefits flowing from the "select use" of natural gas, benefits entirely consistent with the basic purposes of the 1977 Amendments to the Clean Air Act clearly articulated by Congress. A.G.A.'s purpose in submitting its brief is to provide concrete examples

of how the "bubble" policy provides a wider array of economic choices with the capability of environmental, economic, and national security gains, consistent with Congressional intent.

WHEREFORE, the American Gas Association respectfully moves that this Court grant permission to file its brief *amicus curiae*, attached hereto, in support of the positions of the Petitioner.

Respectfully submitted,

JOHN A. MYLER
Attorney for the
American Gas Association

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BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION

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REGULATIONS

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BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION

I. Interest of the *Amicus Curiae*

The American Gas Association (A.G.A.) is a national trade association representing approximately 300 member companies active in the local distribution or pipeline transmission of natural gas. A.G.A.'s member companies provide approximately 85 percent of the nation's natural gas utility sales, approximately one-half of which (53%) are sales to industrial users, including electric utilities which use the gas in generating electricity. A.G.A. member companies have a direct interest in the issues before the Court in this proceeding since the practical effect of the judgement of the U.S. Court of Appeals for the District of Columbia Circuit is to discourage certain uses of natural gas in non-attainment areas – a policy determination unintended by Congress and in direct conflict with the basic purposes of the Clean Air Act, as amended.[1] The approach authorized by the EPA and voided by the Court of Appeals

[1] The Court of Appeals' decision is reported at 685 F.2d 718.

produces cleaner air and also provides additional benefits of cost savings and improved national energy independence.

II. **Argument**

Pursuant to Part D of the Clean Air Act as amended, states which had not, by 1977, met national air quality standards established by the EPA were directed to require permits for the construction of "new or modified major stationary sources" of air pollution in non-attainment areas. In October, 1981, the EPA adopted a regulation for Part D which permitted states for purposes of reviewing "new or modified major stationary sources" to utilize a "plant-wide" definition of "stationary source" that treats an industrial plant as a single source, an example of what is the so-called "bubble" concept.[2] The Court of Appeals has invalidated that regulation, finding the use of the bubble concept inappropriate in programs enacted to improve the quality of ambient air. A.G.A. submits that the application of a "plant-wide" definition to "stationary source" for purposes of new source review under Part D is legally permissible and socially desirable. Use of the bubble concept affords firms the flexibility to meet air quality standards in the most efficient and cost-effective fashion. There is no identifiable inconsistency between the bubble approach and the basic Congressional goal of bringing all national air quality regions into compliance with the requirements of the Clean Air Act pursuant to Part D thereof, 42 U.S.C. § 7501 *et seq.*

Congress stated quite clearly that the 1977 amendment to the Clean Air Act aimed at the so-called non-attainment areas (Part D) has

> "two main purposes: (1) to allow reasonable economic growth in [a non-attainment] area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purposes than EPA's present interpretive regulations afford."

H.R. Rep. No. 95-294 at 211.

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[2]C.F.R. 51.18(j)(1)(ii); 40 C.F.R. 52.24(f)(2).

The bubble concept provides direct support to achieving both Congressional purposes. Indeed, the EPA relied, in the process of establishing the bubble approach, on indications that to define "stationary source" otherwise tended to frustrate legislative intent.

EPA noted expressed concerns that its prior definition of "source" as both an industrial plant and the individual pieces of process equipment within the plant provided disincentives to new investment and modernization by discouraging modifications to existing facilities and could retard enhanced air pollution control by discouraging replacement of dirtier equipment with cleaner. 46 Fed. Reg. 16280, 16281 (March 12, 1981); 46 Fed. Reg. at 50768.

The discussion below provides concrete examples of how the bubble policy provides a wider array of economic choices and the potential for environmental, economic, and national security gains, consistent with legislative intent.

A. Superior Environmental Characteristics of Natural Gas Combustion

Natural gas is the cleanest burning fossil fuel. It emits virtually no sulfur dioxide (a component of "acid rain") or particulate matter when combusted. Emissions of carbon dioxide, carbon monoxide, nitrogen oxide and non-methane hydrocarbons are all significantly less with natural gas combustion than with the combustion of other fuel sources (e.g., coal or oil).[3] As an example, a large electric utility or industrial boiler operating on natural gas emits only .0006 pounds of sulfur dioxide (SO_2) per million Btus (MMBtu) of fuel consumed.[3] In contrast, typical grades of fuel oil and coal burned under similarly sized boilers would release 1.6 and 3.4 pounds of SO_2 per MMBtu, respectively.[4]

Employing the bubble concept with natural gas permits the fuel mix at a plant to be altered to meet varying sulfur

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[3]*Compilation of Air Pollutant Emission Factors*, Pub. No. AP-42, U.S. Environmental Protection Agency at 1.4-2 (3rd Ed., August, 1977).

[4]*Id.* at 1.1-3 (coal), at 1.3-2 (oil). Fuel oil would thus emit 2667 times the amount of SO_2 as natural gas, coal 5667 times.

dioxide emission limits. The tables attached as Appendices 1 and 2 show how this concept operates. For example, a plant-wide emission limit of 1.4 pounds of sulfur dioxide per MMBtu could be achieved by operating the plant on a mix of 33 percent gas and 67 percent fuel oil (2 percent sulfur content) (See Appendix 2). Tighter standards could be met by burning a mix with a higher quality oil, or by increasing the proportion of gas consumed.

B. Potential Benefits of Select Use "Bubbling" – A Hypothetical Industrial Plant Example

A simple illustration of the select use approach is provided by the recently approved "multiple-source" bubble for the Narragansett Electric Company in Rhode Island which was operating two generating stations less than one mile apart, both on 1 percent sulfur oil. The EPA approved a plan allowing one of the units to operate on 2.2 percent sulfur oil, while the other unit burns gas. As a result, anticipated savings were $2-4 million per year, SO_2 emissions will be reduced by 1,388 tons per year, and oil imports will be reduced by 600,000 barrels per year.

Such a plan is exceedingly simple, yet provides substantial benefits, as illustrated by the hypothetical example set out in Appendix 3. Consider an industrial facility with two large boilers, each with a capacity of 250 MMBtu/hr operating on low sulfur (0.5 percent) oil at a cost of $35.36/bbl. (June, 1983 N.Y. harbor price of $30.75/bbl, increased by a factor of 15 percent to account for delivery to the New York/New Jersey area.) An SO_2 emission limit of 0.52 lbs/MMBtu is not uncommon in the Middle Atlantic region. Assuming a capacity utilization factor of 65 percent, the annual fuel cost for these two boilers would be approximately $16.2 million. The annual maintenance expense for the two boilers, based on a charge of 30 cents/MMBtu, would be $850,000. Total annual fuel consumption would be 460,000 barrels of oil (2,848 Trillion Btu), and the SO_2 emission rate would be 0.52 lbs/MMBtu.

The same emission rate, 0.52 lbs/MMBtu, could be achieved by operating on slightly higher sulphur oil (one percent) in one of the units and gas in the second unit. This allows significant

reductions in both fuel and maintenance expenses, *even if the price of gas increases to the price of low sulfur oil* ($5.70/MMBtu, equivalent to oil priced at $35.36/bbl). Economic savings can still be realized, even under this pessimistic gas pricing assumption, since the substitution of gas in the second unit allows lower quality oil to be burned in the first unit – 1 percent sulfur at $29.44/bbl delivered (June, 1983 N.Y. harbor price of $25.60/bbl increased by 15 percent).

As a result of this select use bubbling approach, the annual plant fuel bill is reduced by over $1 million, from $16.2 million to $14.9 million. Again, the cost of fueling the second boiler (with gas) is not assumed to change; the reduction stems entirely from a switch to lower quality oil in the first unit. Boiler maintenance cost is also reduced in the select use case. A reduction of roughly $85,000 results from a charge of 24 cents/MMBtu for gas boiler maintenance versus the 30 cents/MMBtu for oil boiler maintenance. Although the overall energy consumption in each case is the same, 2,848 Trillion Btu, the substitution of domestic gas for oil – much of which is imported – results in an oil savings of 230,000 barrels per year. There is no technological impediment to this select use bubbling option, and the results in terms of environmental impact, reduced fuel costs, maintenance costs and oil consumption are substantial.

C. Potential Benefits of Select Use "Bubbling" – A Hypothetical Powerplant Example

In addition to select use bubbling as a means to reduce fuel and operating costs and oil imports, while maintaining or improving air quality ambiance, by switching from oil-only operations (with emissions monitored on a boiler-by-boiler basis) to a gas/oil fuel mix with emissions monitored on a plant-wide basis, similar results exist for a switch from coal-only to gas/coal. In addition, gas/coal "bubbling" may preclude the need for coal-fired facilities to purchase and operate expensive pollution control equipment.

In 1981 the American Gas Association examined three operating scenarios for 12 New England electric powerplants which are under consideration by the Department of Energy

for conversion from oil to coal. The purpose of the analysis was to compare two conversion options for the 12 plants versus their continued dependence on oil for a generating fuel in all units:

1) Continued dependence on *oil* in their *non-coal-capable* units, and conversion from *oil to coal* in coal-capable units with the addition of adequate pollution control equipment to meet state environmental standards; and,
2) Conversion from *oil to coal* in coal-capable units and some combination of *oil and gas* in non-coal-capable units which would satisfy relevant emission limitations without the addition of SO_2 scrubbers.

For comparison purposes, all cost and energy consumption data were based on *plant totals* rather than on coal-capable boilers alone. For example, in the scrubbed coal scenario, the 20 coal-capable boilers would operate exclusively on coal. However, the analysis also included the energy consumption and costs associated with those boiler units which would not convert (roughly 50 percent of the total generating capacity at the 12 powerplants). For purposes of this analysis, the prices of oil and gas to powerplants were assumed to be equal. A summary of the updated analysis results is provided in Appendix 4 and summarized below.

1) Conversion of all 12 coal-capable New England powerplants to coal with select gas use would be $225 million per year (15 percent) less costly than continuing to operate these plants exclusively on oil. The annualized cost of select gas use, including the capital costs of coal conversion, and operation and maintenance and fuel expenses over 15 years, would be 4.2 cents/kwh as compared with 5.0 cents/kwh for the fuel and operation and maintenance costs associated with a continued dependence on oil (1982 dollars).
   - The total annual cost of converting and operating all 12 plants on coal with select use of gas would average an estimated $1,325 million versus an

average of $1,550 million required annually for continued oil operation (annualized life-cycle cost basis).

2) At the same time, coal conversion of these 12 plants with select gas use would save 100,000 barrels of oil per day, roughly 15 percent of New England's total oil consumption. This oil savings, some 36 million barrels per year (worth $1.2 billion at current prices), would require 67 billion cubic feet of natural gas per year, about one-third of one percent of current annual domestic gas consumption.

3) By comparison, converting to coal with the use of scrubbers would cost New England electric consumers approximately 10 percent more than converting with select use of gas (4.6 cents/kwh versus 4.2 cents/kwh).

   - Initial capital costs for converting coal-capable units at the 12 plants for select gas use operation would total an estimated $955 million, roughly 50 percent less than the scrubbed coal capital cost of $1,815 million or an annual average cost of $125 million versus $240 million.
   - Average annual operation and maintenance expenses associated with the select gas case would be an estimated $55 million per year, approximately one half the $115 million for the scrubbed coal case.

4) Oil offset by the scrubbed coal case would be 69,000 barrels per day, 31 percent less than the volume potentially offset by the select use gas case.

D. Additional Benefits

In addition to the fuel cost, oil import and maintenance savings offered by select use bubbling in the industrial and powerplant examples presented above, as well as the elimination of large capital expenditures in the powerplant example which would be required absent select use bubbling, this strategy may also offer additional benefits. For example, the multiple oil supply disruptions of the 1970's, coupled with coal miner

strikes and freezing coal piles, indicate that the fuel diversity which select use bubbling presents is indeed worthwhile.

Finally, select use bubbling enhances the opportunity for plants in some areas to burn higher sulfur local coal rather than importing lower sulfur coal from distant sources. This option can be exercised while meeting applicable state implementation plan emission limits; thus, movement toward the attainment of national ambiant air quality standards need not be hindered.

III. Summary of Argument

The utilization of natural gas with less clean energy sources in a bubble mode (referred to as the "select use" of gas) offers a variety of benefits, to the fuel consumer and to the nation. From a national perspective, select use can: maintain or improve air quality; reduce our dependence on imported oil; and increase reliance on domestic coal (and gas). For the energy consumer, select use can: reduce overall fuel costs; reduce susceptibility to fuel supply disruptions, such as a coal or rail strike or an oil embargo; and preclude the need to purchase expensive pollution control equipment.

The EPA regulations at issue in this case were the product of a reasoned decisionmaking process which provided the opportunity for compliance with important legislative goals in a manner offering the benefits described above, benefits consistent with the controlling statutory language and legislative history. As such, they reflect an exercise of agency discretion clearly supportable by precedent of this Court.[5]

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[5] *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87.

IV. Conclusion

The judgement of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN A. MYLER
Attorney for the
American Gas Association

APPENDIX 1[1]

PERCENTAGE OF FUEL MIX REQUIRED TO BE GAS FOR VARIOUS GRADES OF COAL AND SO_2 EMISSION LEVELS

SO_2 SIP (lb./MMBtu)	Sulfur Content of Eastern Coal[2]				Sulfur Content of Western Coal[3]			
	.8%	1%	2%	3%	.8%	1%	2%	3%
0.6	53%	62%	81%	87%	61%	68%	84%	89%
0.8	37	49	75	83	47	58	79	86
1.0	22	37	68	79	34	47	74	82
1.2	6	24	62	75	21	37	68	79
1.4	–	11	56	71	8	26	63	75
1.6	–	–	50	66	–	16	58	72
1.8	–	–	43	62	–	5	53	68
2.0	–	–	37	58	–	–	47	65
2.2	–	–	31	54	–	–	42	61
2.4	–	–	24	49	–	–	37	58
2.6	–	–	18	45	–	–	32	54
2.8	–	–	12	41	–	–	26	51
3.0	–	–	5	37	–	–	21	47

[1] *Select Gas Use for Environmental Purposes*, American Gas Association 20 (January, 1983).

[2] 12,000 Btu/lb.

[3] 10,000 Btu/lb.

APPENDIX 2[1]

PERCENTAGE OF FUEL MIX REQUIRED TO BE GAS FOR[1] VARIOUS GRADES OF RESIDUAL OIL AND SO_2 EMISSION LEVELS

SO_2 SIP (lb./MMBtu	Sulfur Content of Oil				
	.25%	.5%	1%	2%	3%
0.2	23%	62%	81%	90%	94%
0.4	–	23	62	81	87
0.6	–	–	43	71	81
0.8	–	–	24	62	75
1.0	–	–	5	52	68
1.2	–	–	–	43	62
1.4	–	–	–	33	56
1.6	–	–	–	24	49
1.8	–	–	–	14	43
2.0	–	–	–	5	37
2.2	–	–	–	–	30
2.4	–	–	–	–	24
2.6	–	–	–	–	17
2.8	–	–	–	–	11
3.0	–	–	–	–	5

[1] *Select Gas Use For Environmental Purposes*, American Gas Association 21 (January, 1983).

SUMMARY ECONOMIC COMPARISON OF OIL ONLY AND SELECT GAS USE WITH OIL IN TWO LARGE INDUSTRIAL BOILERS

	Oil Only			Select Gas Use with Oil		
	Unit #1	Unit #2	Total	Unit #1	Unit #2	Total
Annual Operating Expense ($000)						
Fuel	$8,100	$8,100	$16,200	$6,800	$8,100	$14,900
Operating & Maintenance	425	425	850	425	340	765
Total	$8,525	$8,525	$17,050	$7,250	$8,440	$15,665
Annual Fuel Consumption (Billion Btu)						
Oil	1,424	1,424	2,848	1,424	0	1,424
Gas	0	0	0	0	1,424	1,424
Total	1,424	1,424	2,848	1,424	1,424	2,848
Annual Oil Savings (000 Bbl)	0	0	0	0	230	230

ECONOMIC COMPARISON OF OIL, SCRUBBED COAL, AND SELECT GAS USE WITH COAL IN 12 NEW ENGLAND POWERPLANTS

	Oil (Base Case)	Coal With Scrubber	Coal With Select Gas Use
Capital Cost ($1982, Millions)			
– Oil to Coal Conversion[1]	–	$790	$790
– SO_2 Scrubber[2]	–	$875	–
– Electrostatic Precipitator[2]	–	$150	$150
– Gas Hook-Up[3]	–	–	$12
Total Capital Cost	–	$1,815	$955
Total Annualized Capital Cost ($1982, Millions)[6]	–	$240	$125
Annualized Operation & Maintenance Cost ($1982, Millions)[4,6]			
– Oil	$50	$25	$15
– Coal			
Scrubber Related	–	$55	–
Non-Scrubber Related	–	$35	$35
Total Coal	–	$90	$35
– Gas	–	–	$5

ECONOMIC COMPARISON OF OIL, SCRUBBED COAL, AND SELECT GAS USE WITH COAL IN 12 NEW ENGLAND POWERPLANTS (Cont'd.)

	Oil (Base Case)	Coal With Scrubber	Coal With Select Gas Use
Total Annualized Operation & Maintenance	$50	$115	$55
Annualized Fuel Cost ($1982, Millions)[5,6]			
– Oil	$1,500	$760	$430
– Coal	–	$330	$385
– Gas	–	–	$330
Total Annualized Fuel Cost	$1,500	$1,090	$1,145
Total Annualized Capital, O&M, and Fuel Cost[6]	$1,500	$1,445	$1,325
Production cost per Kwh (¢1982/Kwh)	5.0¢	4.6¢	4.2¢
Difference per Kwh vs. Oil	–	-0.4¢	-0.8¢
Energy Consumption (Trillion Btu/yr)[8]			
– Oil	306	155	88
– Coal	–	151	151
– Gas	–	–	67
Total	306	306	306
Oil Saved (Thousands of Bbls/day)	–	69	100

ECONOMIC COMPARISON OF OIL, SCRUBBED COAL, AND SELECT GAS USE WITH COAL IN 12 NEW ENGLAND POWERPLANTS (Cont'd.) (Footnotes)

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[1] *Profiles for Title I Existing Electric Powerplants*, (Washington, D.C.; Economic Regulatory Administration, Office of Fuels Conversion, April 1980). Conversion costs based on estimates of $115/Kw for "low-cost" conversions; $340/Kw for "high-cost" conversions.

[2] *Particulate and Sulfur Dioxide Emission Control Costs for Large Coal-Fired Boilers*, (Cincinnati; PEDCo Environmental Inc. for the Environmental Protection Agency, EPA-450/3-78-007, February 1978), pp. 3-12, 4-16. Assumes 3.5% sulfur coal used in limestone scrubber equipped units. Scrubber costs range from $140 to $314/Kw, depending on unit capacity, and varying emission limits. Assumes 3.5% sulfur, 14% ash coal used in scrubbed coal case with electrostatic precipitator. In the select gas use case, 0.8% sulfur coal, 14% ash content assumed. Precipitator costs in both cases range from $26/Kw to $59/Kw, depending on unit capacity.

[3] *Fuel Distribution*, (Argonne; Institute of Gas Technology for Argonne National laboratory, ANL/CESITE 79-8, July 1979), p. 35. Costs reflect distance to nearest gas transmission line, rather than nearest distribution line. It is likely that the distance to gas distribution lines is less than the distance to transmission lines, and thus the gas hook-up cost is probably somewhat overstated. No hook-up cost was added to the West Springfield plant, which currently burns some gas.

[4] Annual O&M expense of 2 mills/Kwh assumed for unscrubbed coal units and 5 mills/Kwh for scrubbed units. See: *A Preliminary Economic Analysis of Reconversion of Coal Capable Utility Boilers* (Washington; ICF for Edison Electric Institute, April 1980), Attachment B. O&M costs for oil and gas units assumed to be 67% and 33% respectively, of unscrubbed coal O&M as per: Kaiser Aluminum & Chemical Corp., *Economics of New Coal versus New Gas/Oil Boilers*, (January 1978), Exhibit 4 and Table IV.

ECONOMIC COMPARISON OF OIL, SCRUBBED COAL, AND SELECT GAS USE WITH COAL IN 12 NEW ENGLAND POWERPLANTS (Cont'd.) (Footnotes)

[5] Fuel price projections for coal and oil from the Spring 1982 TERA Base Case of the American Gas Association; price of gas assumed to equal the price of oil. Coal for scrubber equipped units assumed to be 3.5% sulfur coal for select gas use case assumed to be 0.8% sulfur, and 10% more expensive than average utility coal. Price differentials by sulfur content taken from: *Cost and Quality of Fuels for Electric Utility Plants – July 1980*, (Washington; U.S. Energy Information Administration, November 1980), pp. 12-13. Price differentials reflect those reported in Ohio, a significant producer and consumer of both high and low sulfur coals, which is relatively close to the New England market.

[6] Annualized costs reflect 10 percent per year real time value of money, *exclusive of inflation*. Ten percent is an estimate of the real pretax rate of return of U.S. electric utilities based on: 50-50 debt-equity ratio; 12% return on debt (weighted average of yields on newly issued utility bonds, *Moody's Public Utility Manual, 1980*); 27.2 percent return on equity (derived from price earning ratio of 6.8 and 46% tax rate, *Moody's Public Utility Manual, 1980*); and, an inflation rate of 8.8% (implicit GNP deflator as published in the *Survey of Current Business* of the Department of Commerce).

[7] Energy consumption based on 35% boiler efficiency and 55% annual capacity utilization. Energy contents of 6 MMBtu/bbl (oil), 24 MMBtu/ton (coal), and 1 MMBtu/Mcf (gas) were assumed.

No. 82-1591-CFX
Status: GRANTED

Docketed:
March 25, 1983

Vide:
82-1247
82-1005

Title: William D. Ruckelshaus, Administrator, Environmental Protection Agency, Petitioner
v.
Natural Resources Defense Council, Inc., et al.

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General, Salinsky, Michael H., Emmet, Robert A.

Counsel for respondent: Doniger, David D., Barald, Patricia A., Lettow, Charles F., Salinsky, MichaelH., Tosi, Louis E., Emmett, Robert A., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 14 1983		Application for extension of time to file petition and order granting same until March 26, 1983 (Chief Justice, January 21, 1983).
2	Mar 25 1983	G	Petition for writ of certiorari filed.
3	Mar 28 1983	G	Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae filed.
5	Apr 20 1983		Order extending time to file response to petition until April 29, 1983.
6	Apr 29 1983		Brief of respondent NRDC, et al. in opposition filed. VIDED.
7	May 4 1983		DISTRIBUTED. May 19, 1983
8	May 16 1983	X	Reply brief of petitioner filed.
11	May 23 1983		REDISTRIBUTED. May 26, 1983
12	May 31 1983		Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae GRANTED.
13	May 31 1983		Petition GRANTED. This case is consolidated with case Nos. 82-1005 and 82-1247, and a total of one hour is allotted for oral argument.
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15	Jul 8 1983		Order extending time to file brief of petitioner on the merits until August 15, 1983.
16	Jul 28 1983		Order further extending time to file brief of petitioner on the merits until August 31, 1983.
17	Aug 17 1983		Brief of petitioner Chevron U.S.A., Inc. filed. VIDED.
18	Aug 30 1983		Joint appendix filed. VIDED.
19	Aug 29 1983		Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
20	Aug 29 1983		Brief of petitioners in No. 82-1247, Am. Iron and Steel Institute, et al. filed. VIDED.
21	Aug 31 1983		Brief amicus curiae of American Gas Association filed.
22	Aug 31 1983		Brief of petitioner Administrator of EPA filed. VIDED.
23	Aug 31 1983	G	Motion of American Gas Association for leave to file a brief as amicus curiae filed.
24	Sep 7 1983		Brief amicus curiae of Mid-America Legal Foundation filed. VIDED.
26	Sep 13 1983		Certified record (Box) received.
27	Sep 13 1983		Record filed.

No. 82-1591-CFX

Entry	Date	Note	Proceedings and Orders
29	Sep 15 1983		Order extending time to file brief of responcent on the merits until October 21, 1983.
30	Oct 3 1983		Motion of American Gas Association for leave to file a brief as amicus curiae GRANTED.
31	Oct 18 1983		Order further extending time to file brief of responcent on the merits until October 28, 1983.
32	Oct 21 1983	G	Motion of United Steelworkers of America, AFL-CIC-CLC, for leave to file a brief as amicus curiae filed.
33	Oct 31 1983		Motion of United Steelworkers of America, AFL-CIC-CLC, for leave to file a brief as amicus curiae GRANTED.
34	Oct 28 1983		Brief of respondents NRDC, et al. filed. VIDED.
35	Oct 28 1983		Brief amicus curiae of Pennsylvania, et al. filed. VIDED.
36	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 29, 1984. This case is consolidated with Nos. 82-1005 & 1247. (4th case)
37	Jan 11 1984		CIRCULATED.
38	Feb 17 1984	X	Reply brief of petitioner EPA filed. VIDED.
39	Feb 18 1984	X	Reply brief of petitioner Chevron U.S.A., Inc. filed. VIDED.
40	Feb 22 1984	X	Reply brief of petitioners Am. Iron & Steel Inst., et al. filed. VIDED.
41	Feb 29 1984		ARGUED.